

SIME DARBY INDUSTRIAL SDN BHD**A****v.****DOUBLE DYNASTY SDN BHD**

HIGH COURT SABAH & SARAWAK, MIRI

B

ZULKIFLI BAKAR J

[SUIT NO: 22-21-2008 (MR)]

22 DECEMBER 2012

CONTRACT: *Agreement - Validity of - Whether valid agreement came into being when defendant accepted plaintiff's quotation - Whether agreement became legally binding when purchase price paid - Whether defendant failed to rebut plaintiff's case by submitting 'no case to answer' - Whether plaintiff's case presumed true and proven - Adverse inference - Whether operated against defendant for failure to call evidence - Evidence Act 1950, s. 114(g)*

C**D**

The plaintiff had a long-standing dealership agreement with Caterpillar ('CAT') which prohibited it from selling new CAT equipment for use outside the plaintiff's scheduled territories of Malaysia and Brunei. The plaintiff, in turn, enforced that prohibition on its customers by imposing an Initial Substantial Use ('ISU') condition whenever new CAT equipment was sold. ISU meant that the equipment had clocked more than 2,000 service meter units and also had been in use for not less than 12 months from the date of delivery of the equipment. An ISU discount was given by the plaintiff upon sale but if the ISU condition was breached, *ie*, if the equipment had not completed its ISU exclusively within the ISU territory, or if the equipment had been taken out of the territory or if the buyer prevented the plaintiff's representatives from accessing the equipment to determine the number of service meter units clocked, in such cases, the ISU discount was revoked and the buyer would have to pay on demand to the plaintiff a sum equivalent to the ISU discount. In addition, the buyer would also have to indemnify the plaintiff against all actions or claims taken against it by, *inter alia*, the plaintiff's principal for breach of the dealership agreement. In the instant case, four new CAT excavators ('the excavators') that the plaintiff had sold to the defendant were found to be in Dubai and up for auction. To avert a breach of the dealership agreement, the plaintiff sent its representatives to Dubai to buy back the excavators from the auctioneer and bring them back to Malaysia. The plaintiff's instant claim against the defendant was for the costs it had incurred in undertaking that exercise together with repayment of the ISU discount it had granted the defendant. To prove that the excavators were sold to the defendant, the plaintiff relied upon a quotation ('P2') – containing the description of the

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- A equipment and other terms and conditions which the defendant had accepted, as well as a fax transmission ('D1') the plaintiff had sent, an equipment invoice ('P5') and the plaintiff's official receipt for the sale ('P8'). The defendant submitted that it had no case to answer and elected not to call evidence at the close of the plaintiff's case. The
- B defendant contended that P2 was not a legally binding contract because the offer it contained was only valid for seven days and during that period apart from accepting the quotation, the defendant did not pay any deposit or to take delivery of the excavators, which meant that the offer had lapsed and no contract had come into being. The defendant
- C contended that the purchase of the excavators was governed by a separate and independent agreement made partly orally and partly evidenced by D1, P5 and P8. As none of the latter three documents made reference to P2, the defendant submitted that both the ISU condition and the ISU discount which were mentioned only in P2 did not apply to the sale.
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Held (allowing claim):

- (1) The plaintiff had established a *prima facie* case against the defendant that there was a legally binding contract between them and that there was a breach of the ISU condition resulting in damages suffered by the plaintiff. The court presumed the plaintiff's evidence to be true. The burden was on the defendant to rebut the plaintiff's evidence but as no explanation was put forth, adverse inference under s. 114(g) of the Evidence Act 1950 was drawn against the defendant. Consequently, the defendant's allegation that the excavators were bought pursuant to an independent contract made partly orally and partly in writing was untenable. (paras 34, 45 & 47)
- (2) The plaintiff's case was based not solely on the quotation, P2, but on an agreement in writing contained in and evidenced by P2, D1, P5 and P8. The latter three documents were part and parcel of the 'agreement' which came into being when the defendant accepted the offer in P2. The agreement became a legally binding contract when the purchase price was paid. (paras 11, 16 & 43)
- (3) The plaintiff's offer in P2 was not revoked by lapse of time. The only condition prescribed for the acceptance of P2 was that it had to be signed and accepted within seven days, and that was done. Payment of the deposit was not a pre-condition of acceptance of the quotation. The deposit was only payable on confirmation of the order for the excavators. Delivery was consequent upon payment (paras 16 & 30)

- (4) There was no basis for the defendant's submission that the plaintiff had failed to prove its losses. (para 40) A

Case(s) referred to:

Miller (t/a Waterloo Plant) v. Cawley [2002] EWCA Civ 1100 (*refd*)
Subry Hamid v. Husaini Tan Sri Ikhwan & Anor [2006] 4 CLJ 50 CA (*fol*)
Wasakah Singh v. Bachan Singh [1931] 1 MC 125 (*refd*) B
Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd [2010] 1 CLJ 484 CA (*refd*)

Legislation referred to:

Contracts Act 1950, ss. 6(b), 8
 Evidence Act 1950, ss. 101, 102, 103, 114(g) C

Other source(s) referred to:

Sinnadurai, *Law of Contract*, 3rd edn, vol 1, pp 29, 30

For the plaintiff - Jimmy HT Wee; M/s Jimmy HT Wee & Co

For the defendant - Suzana WL Lim; M/s Susanna & Lau Advocates

Reported by Ashok Kumar D

JUDGMENT

Zulkifli Bakar J: E

Introduction

[1] This is a case where upon completion of the plaintiff's case, the defendant elected not to call for evidence and submitted that the case presented by the plaintiff does not call for an answer from the defendant, hence there is no case to answer. F

[2] In this situation the test is whether or not the plaintiff had established its case on a balance of probabilities is set out in the Court of Appeal case of *Subry Hamid v. Husaini Tan Sri Ikhwan & Anor* [2006] 4 CLJ 50 at p. 57 where in citing the English case *Miller (t/a Waterloo Plant) v. Cawley* [2002] EWCA Civ 1100 said: G

Where a Defendant was put to his or her election and elected to call no evidence, the issue was not whether there was any real or reasonable prospect that the claimant's case might be made out or any case fit to go before a jury or judge of fact. Rather it was the straight forward issue, arising in any trial after all the evidence had been called, namely whether or not the claimant had established his or her case by the evidence called on balance of probabilities. H

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A [3] The Court of Appeal also cited Elphinstone CJ in the case of *Wasakah Singh v. Bachan Singh* [1931] 1 MC 125 who said:

If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the Judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence.

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At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.

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The Plaintiff's Case

[4] The plaintiff's claim concern four units of new Caterpillar 320C hydraulic excavators identified by their serial number ("four disputed excavators") stated in para. 4 of the amended statement of claim.

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[5] The plaintiff's claim is based on their assertion of facts as stated in the pleadings, ie, the amended statement of claims, and reply in particular para. 3 of the reply which is connected to para. 3 of the amended statement of claims which reads:

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The Plaintiff joins issue with the Defendant as to paragraph 13 of the Defence and put the Defendant to strict proof thereof. The Plaintiff contends that the documents described in the particulars of the said paragraph 13 were documents which formed part and parcel of the agreement and were issued to the Defendant in the course of business and the Plaintiff to document the sale of the excavators to the Defendant.

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[6] Premised on the above, the plaintiff's claim is based on an agreement which is contained and evidenced by a quotation identified as QMR 3515 (exh. P2), the plaintiff's fax transmission dated 26 July 2006 (exh. D1), the plaintiff's equipment invoice dated 31 July 2006 (exh. P5) and the plaintiff's receipt dated 4 August 2006 (exh. P8) and not base solely on a quotation QMR 3513 dated 14 February 2006 (exh. P2) as contended by the defendant.

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[7] The quotation by itself does not constitute a legally binding contract because there was no consideration given by the defendant at the material time when the defendant signed to confirm the quotation and agreed to the terms and conditions set out therein.

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[8] However the said quotation crystallised into a legally binding contract as soon as the defendant furnish consideration in the form of payment of deposit or in our instant case full payment for the purchase of the four disputed excavators. (See Sinnadurai on *Law of Contract*, 3rd edn., vol. 1 pp. 29 to 30).

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The Defendant's Contentions

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[9] It is to be noted that the defendant's contention that the quotation does not constitute a legally binding contract was never pleaded nor form part of the defendant's defence. The defendant's defence is that the agreement in writing contained in and evidenced by the quotation dated 14 February 2006 is void by reason of "*non est factum*".

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[10] Alternatively it was the defendant's case that the purchase of the four disputed excavators was not based on the quotation but in accordance with a separate and independent agreement made partly oral and partly in writing evidenced by the three documents described in para. 13 of the defence. Therefore the defendant was bound by its pleadings.

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[11] The defendant's contention that the quotation is not legally binding because it contains no degree of certainty, at most it was an estimate of the cost of a piece of work, is misconceived. There is nothing uncertain about the quotation and it is definitely not an estimate for a piece of work as contended by the defendant. It was a quotation for the sale of ten units of new Caterpillar 320C hydraulic excavators for a firm price of RM320,000 per unit with very specific and definite terms which does not give room for uncertainty. It was a definite offer which was accepted by the defendant when its Managing Director signed, accepted and agreed to the terms set out therein; consequently and agreement came into being.

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[12] This is consistent with the evidence given by the plaintiff's witness. For example when PW1 was taken through evidence in chief on the contents of quotation exh. P1 (QMR 3505 (for purchase of 50 units of Skidders)) he was asked by this court whether the "exh. P1" was a quotation or an agreement, PW1 answered:

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Court Q : Is this document a quotation or an agreement?

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A : Originally it is a quotation. It was offered to the buyer and he accepted it by signing so to us it is an agreement.

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- A** [13] When PW1 was cross-examined on exh. P2 (QMR 3515 for ten units of excavators) he reiterated that a quotation when signed and accepted by the defendant became an agreement. This was what he said:

P2 at pg. 9 referred

- B** Q : In your examination in chief you mentioned that P2 is only a quotation it becomes an agreement when the defendant signed on the quotation, where is the signing part by the Defendant?

A : At the bottom left of pg. 9.

- C** Q : Can you please read out what is the sentence above the signing part by the Defendant?

A : (witness read).

- D** Q : From what you have read, I put it to you that the Defendant did not accept the quotation as an agreement upon signing?

A : I do not agree.

Q : Can you read the first sentence from top at pg. 9 (exh. P2)?

A : (witness read).

- E** Q : Was the confirmation of order stated in the signing part of Defendant at pg. 9?

A : Yes.

- F** Put : That the Defendant did not confirm the order upon signing the quotation.

A : I disagree.

Put : That the Defendant did not accept the quotation upon signing on pg. 9 of Exh. P2?

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A : I do not agree.

[14] Next the defendant says that the quotation is not legally binding because there was non-compliance of the terms of the quotation as to:

- H** (a) Time of delivery,

(b) Place of delivery,

(c) Validity; and

- I** (d) Payment of 10% deposit.

This court ruled this argument is again without merits.

[15] The defendant contends that the quotation is not legally binding because there was non-compliance by the plaintiff in the terms of the quotation as to time of delivery. Since the quotation was confirmed on 14 February 2006 the delivery should be immediately after 14 February 2006. As this was not done the quotation is not legally binding.

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[16] This is incorrect. A distinction must be made between the validity and enforceability of an agreement. In our case once the quotation is signed and accepted by the defendant within the stipulated time, it becomes a valid agreement. This agreement becomes enforceable or becomes a legally binding contract when consideration is given by the defendant. In our instant case when the defendant signed and accepted the quotation no immediate delivery was done for obvious reason that no deposit was paid (or in legal term no consideration was given by the defendant). Subsequently when the four disputed excavators were ordered and full payment made, it triggered the agreement into a legally binding contract and there was no breach as to the terms of immediate delivery as the four disputed excavators were delivered to the defendant and accepted by them. Thus the sale had been completed; hence no legal action taken or is required to be taken against the defendant.

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[17] As for the remaining one unit which the defendant did not take up, no legal action was taken because no deposit was made to the plaintiff. This was confirmed by PW1 as well as PW4.

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[18] This had been the mode of doing business between the plaintiff and the defendant as evidenced by their various previous dealings including the sale and delivery of the first batch of five excavators in May 2006 based on quotation QMR 3515 (exh. P2). At the material time of signing of the quotation on 14 February 2006 by the defendant no deposit was made by them. Naturally no good would be supplied. Nevertheless that does not mean that no agreement has been reached between the plaintiff and the defendant. An agreement had definitely been reached when the quotation containing very firm and specific terms and conditions had been accepted by the defendant when their Managing Director signed and agreed to the terms set out therein within the seven days set out therein. This agreement became a legally binding contract when the defendant furnished consideration for the purchase. In May 2006 the defendant arranged for the purchase of first batch of five excavators by making full payment by way of hire purchase through Caterpillar Financial Services Malaysia Sdn Bhd. It was only when full payment was made that the first five units of the ten excavators were delivered to the defendant. (See exhs. P2(c), P2(d), P3(a) to P3(c) and P4(a) to P4(e)).

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- A** [19] The same *modus operandi* was used in the purchase of four other Caterpillar new 320C hydraulic excavators by the defendant in April 2004 under QMR 3189 (exh. P20). In this instant purchase the defendant signed QMR 3189 (exh. P20) on 26 April 2004 but did not pay any deposit. Form T1 was issued by the plaintiff on 27 April 2004
- B** (exh. P47). The defendant only asked for delivery of two out of the four units three months thereafter in July 2004 and a fax transmission was sent to the defendant confirming the mode of payment described in the said fax (see exh. P48). Equipment invoice dated 21 July 2004 was issued for these two units (see exh. D6(4)) and defendant took delivery
- C** on 1 October 2004. The remaining two units were requested in September 2004, (exh. P49) paid for and delivered on 1 October 2004.

[20] Yet other examples of the same mode of doing business between the plaintiff and the defendant can be found in the past purchases of the following machines by the defendant:

- D** (i) one unit of Caterpillar 416 backhoe under QMR 3189 (exh. P22)
- (ii) one unit of 12 H Motor Grader under QMR 3438 (exh. P23)
- (iii) one unit of 120H Motor Grader under QMR 3436 (exh. P24) and
- E** (iv) 50 units of Track Type Cable skidder under QMR 3505 (exh. P1).

- F** [21] In all these past purchases, compliance as to the terms of deposit, place, validity and time of delivery were never complied with at all or only in part and yet the sale of these various machines were completed and delivery given and accepted without any complain or protest. The defendant never alleged that these various quotations did not constitute legally binding contract as they now alleged in this suit.

- G** [22] As for the alleged non-compliance on the terms as to the place of delivery, there is irrebuttable evidence to show that the venue was changed at the request of the defendant. In any event there was no protest or even complain by the defendant at the material time; therefore it does not now lie in the mouth of the defendant to make such complain.

- H** [23] What is required of the defendant to confirm the validity of the said quotation is their confirmation by signing and accepting the quotation within the seven days stipulated in the quotations. This was done PW1 and PW4 both confirmed in evidence that the quotation was signed and accepted by the defendant's Managing Director Datuk Yee
- I** Ming Seng on 14 February 2006. What was not done within the seven

days was the delivery of the excavators. However this does not affect the validity of the quotation at all as the quotation does not provide for the plaintiff to deliver all or any of the ten units of excavators within seven days from the date of the quotation in order to confirm its validity.

[24] The defendant also contends that the quotation was not legally binding because the defendant did not pay a 10% deposit. However that does not mean that the plaintiff has no cause of action against the defendant. In our instant case after the defendant signed and accepted the quotation, no legal action was taken against the defendant for not paying the deposit for obvious reason that no deposit was paid (no consideration was given by the defendant). Subsequently when the four disputed excavators were ordered and the defendant made full payment it triggered the agreement into a legally binding contract and consequently no breach in respect of the payment of 10% deposit arise.

[25] The defendant further contends that the fact that the plaintiff's witness PW4 gave evidence to confirm that plaintiff would still honour the quotation after the validity period provided that the price of the excavators remain unchanged and if the price changed after the validity period the price is subject to negotiation shows that there was no agreement reached between the parties due to uncertainties in the price. This is incorrect. A distinction must be made between the validity and enforceability of an agreement. In our case once the quotation is signed and accepted by the defendant within the stipulated time, it becomes a valid agreement. This agreement becomes enforceable or becomes a legally binding contract, only when consideration is given by the defendant. As the defendant did not pay the deposit, there is no contradiction in honouring the quotation after the validity period if the price of the excavators remains unchanged as the purpose of the validity clause is to maintain the price of the excavators. There is also no contradiction for the plaintiff to say that if the price of the excavators changed after the validity period the price is subject to negotiations as it is clearly provided for in the quotation under cl. 2 of the condition of sale therein which states:

The price quoted herein is based on the costs of material, labour, transport and statutory obligations ruling at the date of quotation and if between this date and that when the goods are ready for dispatch there shall be any increase whatsoever in these aforesaid costs including price increase by TMB's supplier or manufacturer, then such increase shall be added to the price quoted herein and become payable by the buyer.

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A [26] This was further confirmed by PW1 who in cross-examination put it in another way as follows:

Pg 7 of Exh P2 referred.

Q : The quotation is valid for how many days?

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A : 7 days.

Q : From what date?

A : From the 14.2.2006.

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Q : So the last day is on 21.1.2006?

A : Yes, but if the buyer want the machines at the later date and if we have them at the old price we still give them to him.

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Q : Did the Defendant confirm the order for the excavators before the 21.2.2006?

Q : Yes he confirmed on the 14.2.2006.

Put : That the Defendant never confirm the order for the excavators before the 21.2.2006.

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A : I disagree.

Put : That this quotation had lapsed.

A : No, it does not lapse if we still have the current stock.

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[27] The defendant further contends that there was no contract because there was no acceptance of the plaintiff's quotation by making payment of a 10% deposit and taking immediate delivery of the excavator. Section 8 of the Contracts Act 1950 ('Contracts Act') is cited in support. There is no merit in the defendant's argument.

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[28] Section 8 deals with the acceptance of an offer. Once an offer has been duly accepted in accordance with the criteria laid down therein the first two component of a legally binding contract, namely an offer and an acceptance has been satisfied. An agreement comes into being. Once consideration is given and there was intention to create legal relation the agreement becomes a legally binding contract.

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[29] In our case, the quotation was clearly and unequivocally accepted when the defendant's Managing Director Datuk Yee Ming Seng signed the quotation and agreed to the terms set out therein on 14 February 2006. The said quotation was made to the defendant with the condition

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that it is valid for seven days from the date thereof. By signing and accepting the terms of the quotation within the stipulated time the plaintiff's offer has been accepted by the defendant; therefore the provision set out in s. 8 of the Contracts Act has been complied with.

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[30] The defendant finally contends that the plaintiff's offer have been revoked by the lapse of time citing s. 6(b) of the Contracts Act. Applying s. 6(b), the defendant's contention that their lack of acceptance within seven days of the quotation by non-payment of the 10% deposit and not taking immediate delivery of the ten units of excavators meant the plaintiff's offer had been revoked by lapse of time on 21 February 2006. No contract is thus formed.

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[31] This is incorrect. The only condition prescribed for the acceptance of the offer (quotation) is that it must be signed and accepted within seven days from the date thereof. Payment of the 10% non-refundable deposit was not a pre-condition of acceptance of the said quotation. The provision on deposit in "P2" states:

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A non refundable 10% deposit of the total selling price is payable on confirmation of the order.

[32] The said provision did not say that the 10% deposit must be paid upon confirmation of the quotation. If it did, it would probably have said something to this effect "A non-refundable 10% deposit of the total selling price is payable upon signing hereof or upon confirmation of this quotation". It is therefore abundantly clear that the plaintiff's quotation had been duly accepted and had not been revoked as contended by the defendant.

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Other Issues Raised

[33] *Plaintiff's Fax Transmission Dated 26 July 2006 (exh. D1), Plaintiff's Equipment Invoices Dated 31 July 2006 (exh. P5) And Plaintiff's Receipt Dated 4 August 2006 (exh. P8)*

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(a) The defendant alleged that the purchase of the four disputed excavators was made orally by telephone by one Madam Fong Yueh Mei acting for the defendant.

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(b) The written evidence for the purchase were the following three documents:

(i) Plaintiff's fax transmission dated 26 July 2006 (exh. D1);

(ii) Plaintiff's equipment invoice containing terms of sale dated 31 July 2006 (exh. P5); and

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- A (iii) Plaintiff's receipt dated 4 August 2006 (P8).
- (c) All these three documents make no reference to the said quotation. That being the case, the defendant submits that the condition of sales, the ISU discount and the ISU condition that appear only in the quotation have no application in closing the sale of the four disputed excavators.
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- (d) This argument is without basis. Both PW1 and PW4 have told this court that the four disputed excavators were purchased based on the said quotation and the aforesaid three documents were part and parcel of the quotation and not independent of it.
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- (i) See Q & A 20 to 25 of witness statement of PW1;
- (ii) Q & A 21 to 28 of witness statement of PW4; and
- D (iii) The evidence of PW4.
- (e) It is to be noted that prior to the purchase and delivery of the four disputed excavators in July 2006, the defendant had requested for delivery of five excavators in May 2006 also based on quotation QMR 3515 (exh. P2). At the material time of signing of the quotation on 14 February 2006 by the defendant no deposit was made by them. Naturally no goods would be supplied. In May 2006 when the defendant's Madam Fong requested for delivery of five units of excavators under QMR 3513 by telephone, Form T1 was issued, a fax transmission containing serial numbers of the excavators and confirming the mode of payment was sent to the defendant followed by sending of equipment invoices, delivery order/notes and official receipts. The defendant made full payment through hire purchase finance from Caterpillar Financial Services Malaysia Sdn Bhd. It was only when full payment was made that the first five units of the ten excavators were delivered to the defendant. (exhs. P2(c), P2(d), P3(a) to P3(c) and P4(a) to P4(e)).
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- (f) The same *modus operandi* was used in the purchase of four other Caterpillar new 320C hydraulic excavators by the defendant in April 2004 under QMR 3189 (exh. P20). In this instant purchase the defendant signed QMR 3189 (exh. P20) on 26 April 2004 but did not pay any deposit. Form T1 was issued by the plaintiff on 27 April 2004 (exh. P47). The defendant asked for delivery of two out of the four units and a fax transmission was sent to the defendant confirming the mode of payment described in the said fax (see exh. P48). Equipment invoice dated 21 July 2004 was issued for these two unit (see exh. D6(4)) and defendant took delivery on
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- 20 July 2004. The remaining two units were requested in September 2004, (exh. P49) paid for and delivered on 1 October 2004. (See evidence of PW4). **A**
- (g) Yet other examples of the same mode of doing business between the plaintiff and the defendant can be found in the past purchases of the following machines by the defendant: **B**
- (i) one unit of Caterpillar 416 backhoe under QMR 3189 (exh. P22)
- (ii) one unit of 12 H Motor Grader under QMR 3438 (exh. P23) **C**
- (iii) one unit of 120H Motor Grader under QMR 3436 (exh. P24) and
- (v) 50 units of Track Type Cable skidder under QMR 3505 (exh. P1) **D**
- (h) The defendant never alleged that all these past dealings were independent business transactions conducted partly oral and partly written, evidenced by their respective fax transmissions, equipment invoices and receipts as they alleged in this suit even though in these past dealings as described above the same type of fax transmission, equipment invoices and receipts were also issued as part and parcel of the various quotations to capture the respective sales. The defendant chose not to call evidence to rebut plaintiff's contention. **E**
- [34]** At this juncture I reminded myself to what the Court of Appeal said in *Subry Hamid's* case should be the approach in evaluating the evidence produced by the plaintiff's witness. The Court of Appeal cited Elphinstone CJ in the *Wasakah Singh v. Bachan Singh* [1931] 1 MC 125 who said: **F**
- If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the Judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. *For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.* (emphasis added). **H**
- [35]** Applying the above principles I ruled that the plaintiff's evidence in this respect must be presumed to be true. The burden then lay on the defendant to call their witness Datuk Yee Ming Seng and Madam **I**

- A** Fong to rebut the plaintiff's evidence that the purchase of the four disputed excavators was not an independent transaction conducted partly oral and partly in writing as evidence by the aforesaid three documents. As no explanation was given by the defendant for this failure an adverse inference should be drawn against them under s. 114(g) of the Evidence Act 1950 ('Evidence Act'). The defendant's case must necessarily falls.
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[36] Form T1 (exh. P2(B))

- C** (a) The defendant contends that no reliance should be placed on this "Form T1" as it was an internal document not given to the defendant and that the defendant was not privy to this document. The right question to ask is not whether the defendant is privy to Form T1 but whether the defendant is privy to the said quotation as alleged by the plaintiff or that the purchase of the four disputed excavators was an independent transaction as pleaded in para. 13 of the defence.
- D**
- E** (b) When the defendant requested for the first delivery of the five units of excavators in May 2006 pursuant to the said quotation, this Form T1 was issued together with the equipment invoices and also fax instructions for the delivery of the five units of excavators to the defendant. The Form T1 was dated 2 May 2006 with a reference number "FMR/YTH/06-10/F(1-10)".
- (c) The reference number on the said "Form T1" stands for, FMR - Forestry Miri,
- F** YTH - the initial of the person making the sale Yii Teck Hoe;
- 06 - year of sale in this case 2006;
- 10 - the tenth Form T1 issued by YTH for the year;
- G** F - Forestry; and
- (1-10) - number of units of excavators.
- H** (d) On the left hand column of Form T1 it stated the customer name as Double Dynasty Sdn Bhd and the equipment purchased was ten units of new 320C excavators at RM320,000 per unit.
- (e) On the right hand column under sales term the quotation number 3513 was clearly referred to and this number is the quotation number stated in the agreement.
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- (f) The two equipment invoices marked “P2(c) and P2(d) both dated 30 May 2006 stated that there were invoices addressed to Caterpillar Financial Services Malaysia Sdn Bhd for hirer Double Dynasty Sdn Bhd for the sale of a total five units of excavators. Although the aforesaid invoices did not refer to the quotation number both did contained the “Form T1” as FMR/YTH/06-10/F in the middle of the page under the heading “Description.” A
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- (g) Similarly for documents “P3(a) to P3(c)”. These are three fax instructions to the plaintiff’s Bintulu branch manager to deliver the five units of excavators to the defendant’s site at Sebauh, Bintulu. These three faxes although did not state the quotation number they contained the Form T1 reference number FMR/YTH/06-10/F which in turn contained the quotation number 3513. C
- (h) Therefore the two equipment invoices P2(c) and P2(d) and the three fax instructions exhs. P3(a) to P3(c) showed conclusively that the five excavators delivered to the defendant in May 2006 were bought under QMR 3515. These evidence had never been challenged by the defendant in cross-examination. D
- (i) In respect of the second delivery in July 2007 of the four disputed excavators (subject matter of this suit) the equipment invoice dated 3 July 2006 (exh. P5) and the receipt for payment dated 4 August 2006 (exh. P8) respectively also had the Form T1 reference number stated therein as FMR/YTH/06-10/F which in turn also contained the quotation number 5313. E
- (j) If the equipment invoices (exhs. P2(c) and P2(d)) for the excavators and the three faxes instructions all contained the same Form T1 reference number issued for the five excavators in May 2006 were purchased based on QMR 3513, it would be very odd to allege that P1, P5 and P8 (fax transmission, equipment invoices and receipts respectively) which also contained the same Form T1 reference number was not raised under QMR 3513 but instead under an independent contract. F
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- (k) Again applying the principles enunciated in the Court of Appeal case of *Subry Hamid* these evidence produced by the plaintiff must be presumed to be true. In the premises there is no basis for the defendant to assert that no reference to the said quotation was made in “exh. D1”, “exh. P5” and “exh. P8” pertaining to the purchase of the four disputed excavators in July 2006 and therefore these three documents were raised pursuant to an independent contract as pleaded in para. 13 of the defence. H
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A [37] Plaintiff's Reply To Defence

- (a) The defendant argues that the plaintiff could not rely on the argument that the equipment invoice (exh. P5) and the official receipt (exh. P8) were complete set of documents to conclude the sale started with the said quotation since the machine delivery orders and the Form T1 were not included in para. 3 of the reply.
- B**
- (b) Plaintiff did not plead that the fax transmission, the equipment invoice and the official receipt were the complete set of document as contended by the defendant. What the plaintiff pleaded in para. 3 of their reply was that the aforesaid three documents were part and parcel (not complete set) which formed the said quotation.
- C**
- (c) There is also no departure in the plaintiff's pleadings as submitted by the defendant. A departure comprised of the setting up of a new cause of action in a reply which was not raised in the statement of claim and which was inconsistent with the statement of claim. The plaintiff did not offence such rule. The plea in para. 3 of the reply is not a new cause of action nor was it inconsistent with the cause of action pleaded in the amended statement of claim. Rather the said plea in para. 3 of the reply complements the cause of action in the amended statement of claim. It contained a positive averment to rebut the defence case that the purchase of the four disputed excavators was an independent contract and that the three documents namely the fax transmission, the equipment invoice and the official receipt (exhs. D1, P5 and P8 respectively) formed and were part and parcel of the agreement.
- D**
- E**
- F**

[38] Indemnity

- (a) The defendant argued that the plaintiff does not have a claim against the defendant for indemnity against all losses suffered by the plaintiff in respect of the claim brought by the plaintiff's principal Caterpillar because of the following reasons:
- G**
- (i) PW4 said that the penalty would be imposed on the defendant and not the plaintiff and further PW4 suggested that Caterpillar ought to be the plaintiff in this case;
- H**
- (ii) There is no evidence to show that Caterpillar had brought a claim against the plaintiff; and
- (iii) The indemnity clause in cl. 12(d) had not been triggered by a demand.
- I**

- (b) The defendant's submission is erroneous. The plaintiff's claim against the defendant is for damages suffered as a result of bringing back the four disputed excavators to Malaysia to avoid a material breach of their commitment to the plaintiff's principal Caterpillar under the dealership agreement. The plaintiff's claim not for indemnity for losses incurred as a result of claim made by Caterpillar against the plaintiff. Therefore the defendant's argument is misplaced.

See evidence of PW1 in A72 and 73 of his witness statements stated as follows:

Q : Why did Plaintiff have to bring the 4 units of new 320C excavators back to Malaysia? C

A : Because we have a dealership agreement with our Principal Caterpillar which prohibits us from selling our equipment to be used outside our scheduled territory of Malaysia and Brunei. D

Q : What would happen if equipment sold by Plaintiff is used outside your scheduled territories?

A : This constitute a material breach of the terms of the dealership agreement and our dealership agreement may be terminated. E

See further evidence of PW1 in A4 of his witness statements where he stated as follows:

Q : What are the things you wish to expand in your answers to questions 72 & 73? F

A : In addition to my answers to questions 72 & 73 I would like to say that our company, the Plaintiff, relies predominantly on the dealership from our Principal, Caterpillar for our business. We have been their dealer for 80 years and without this dealership there would not be any reason for Plaintiff to exist. G

In order to show our commitment to this dealership and not to tarnish our image and integrity in the eyes of our Principal we have always adhered to the terms and condition of the dealership strictly. H

One of the terms of our dealership agreement with our Principal, Caterpillar, prohibits us from selling new CAT equipment outside our territory i.e., Malaysia and Brunei. This prohibition has been cascaded down to our respective I

- A** customers, including the Defendant, in the form of the ISU condition. I wish to refer to my answer to question no. 16 of my earlier witness statement regarding the condition on the ISU discount.
- B** Furthermore, in practice our Principal, Caterpillar considers the breach of territorial rights as a serious contravention of the dealership as territorial rights given to Caterpillar's dealers worldwide is one of the measure that have been put in place by Caterpillar to control, maintain and monitor their worldwide chain of distributorship. This is proven by the fact that it was our
- C** Principal, Caterpillar who had alerted us on the 4 units of 320C hydraulic excavator that has been put up for auction through Ritchie Brothers in Dubai.
- D** If we do not take action whenever there is such breach by our customer, Caterpillar would perceive that we are collaborating with customer to export machines out of our territory and that we are not upholding the ISU condition on the ISU discount. Therefore we will take all necessary actions, at any costs, in order to ensure that we recover any machines which were exported outside of our territory as we do not want to take any risk which could jeopardize our relationship with our Principal or our dealership.
- E**
- F** There has been a previous case of breach by a customer of Tractors Singapore Limited, a sister company of the Plaintiff, of the same condition sometime in mid eighties where the machines, which were excavators, the were exported out of Singapore and were discovered in 3 different locations which 2 were in the USA and 1 was Canada and we had taken the same action without any hesitation and compromise; we always sent our people to buy back the machine/equipment to ensure that our integrity is preserved.
- G**
- H** (c) The penalty referred to by PW4 in A14 of his witness statement (encl. 44) and also A16 of PW1's witness statement (encl. 46) obviously meant the defendant would have to compensate the plaintiff an amount equivalent to ISU discount if the ISU condition were breached and have nothing to do with the indemnity alluded to by the defendant in their argument.
- (d) Clause 12(d) of the quotation provides as follows:
- I** The ISU discount shall be revoked and the buyer shall forthwith upon demand pay to TMB (meaning the Plaintiff) an amount equivalent to ISU discount if:

- (i) The Buyer has failed to prove to TMB's satisfaction (whose satisfaction is at its absolute discretion) that the equipment has completed its Initial Substantial Use exclusively within the ISU Territory; or **A**
- (ii) The equipment is located (permanently or temporarily) outside the ISU Territory prior to completing its Initial Substantial Use; or **B**
- (iii) The Buyer fails to allow or procure free and unencumbered access to the equipment for authorized representatives of TMB to determine the number of service meter units clocked in the equipment. The Buyer shall (in addition to being liable to pay TMB an amount equivalent to the ISU Discount, if applicable) also indemnify and keep fully indemnified TMB from and against any and all actions proceedings, damages, losses, costs, demands, claims and expenses (including without limitation legal cost on a fully indemnity basis) that may be suffered or incurred by TMB in respect of any and all price equalization, territorial infringement and/or its related corporations and/or their respective dealers, distributors and agents. Where the ISU Discount is expressed in any currency other than Ringgit, the ISU Discount shall be converted into Ringgit using the rate of exchange (for selling the other currency) published by Bank Negara Malaysia for the business day preceding the date of demand by TMB. **C**
- D**
- E**
- Clause 12(e) states:
- For avoidance of doubt, the Buyer shall remain liable to pay TMB an amount equivalent to the ISSU Discount notwithstanding that the Buyer may have disposed the equipment to another person or entity and/or the relocation of the equipment outside the ISU Territory was not caused by the buyer. **F**
- (e) Clause 12(f): **G**
- "Initial Substantial Use" means that the equipment has clocked more than 2,000 service meter units and also, has been used for not less than 12 months from the date of delivery of the equipment.
- (f) Therefore when PW1 and PW4 said that the defendant would have to pay a penalty if the ISU condition is breached by the defendant they obviously meant that the defendant would have to refund to the plaintiff the amount equivalent to the ISU discount as expressly provide for in cl. 12(d). **H**

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A (g) The indemnity is an additional right conferred upon the plaintiff in cl. 12(d)(iii) to claim against the defendant if there is any claim by the plaintiff's principal and/or related companies and/or their respective dealers, agents or distributors against the plaintiff for price equalisation or territorial infringement fees.

B (h) Therefore the defendant's argument on this issue has no merits.

[39] Losses Not Supported

C (a) There is no basis in the defendant's submission that the plaintiff's loss was not supported by the evidence as stated in the defendant's submission.

D (b) PW3, Puan Rohana Mat Ali gave evidence going through in detail how the final account (exh. P31) was arrived at and supported her evidence with the various documentary evidence introduced in this trial. The only two items in the final account (P31) which she conceded were not calculated correctly/or not supported by the evidence were, (a) the financing costs; and (b) the storage cost for the month from September to November 2007.

E (c) The financing costs of RM137,056.70 in P31 was wrong because it was calculated based on the auction costs for the repurchase of the four disputed excavators in Dubai at RM1,796,900 (exh. P39) (see p. 241 of bundle C). The auction cost pleaded in the amended statement of claim was RM776,962.50. She conceded that the correct amount to be used for calculation the financing cost should be the one pleaded in the amended statement of claim. Using the said amount the financing costs should be reduced to RM135,535.99 instead of RM137,056.70.

G (d) The claim for storage costs for the four disputed excavators for the month of September to November 2007 in Dubai amounted to RM5,150.40 was dropped because the yard owner did not subsequently claim the same from the plaintiff.

H (e) Adjusting the aforesaid two items the final and correct amount claimed was:

I	(i) Pledged amount	RM829,280.82
	(ii) Deduct difference between RM137,056.70 - RM135,535.99	RM1,520.71
	(iii) Storage charge for Sept - Nov 2007	RM5,150.40

- (iv) Correct amount claimed RM822,609.71 **A**
- (f) Although the amount claimed in the amended statement of claim was RM829,280.82 there is nothing to prevent this court from entering judgment for the plaintiff for the reduced sum of RM822,609.71 without the need for amendment of the said amended statement of claim as this court has inherent power to do so. In any event the prayer in the amended statement of claim also provide power to this court to give such relief as this court deem fit. **B**
- In the circumstances the defendant's submission on this point is without merit. **C**
- [40] Loss Not Proved**
- (a) Paragraph 12(a) & (b) Of Amended Statement Of Claim
- Document evidences were produced to prove the expenses incurred in the purchase of the four disputed excavators in Dubai amounted to USD500,000. There is no legal requirement that the bid price must be approved by Caterpillar and the defendant. This is a baseless requirement. PW2 had confirmed that there were about 200-300 people present in the auction and his evidence must be accepted as true in this context. **D**
- (b) Paragraph 12(c) Of Amended Statement Of Claim
- Similarly there is no legal requirement that the storage charges have to be approved by the defendant. **E**
- (c) Paragraph 12(d) Of Amended Statement Of Claim
- Financing costs is a fair and reasonable claim by the plaintiff herein. Their fund would have been put to better use had no breach been made by the defendant. As a result of the breach by the defendant the plaintiff had to set aside funds to repurchase the four disputed excavators. It is only fair and reasonable that these unnecessary costs be reimbursed. **G**
- It is not true that the financing costs had not been incurred. PW3 confirmed that the said amount had been automatically charged against the plaintiff by their finance department. **H**
- (d) Paragraph 12(f) Of The Amended Statement Of Claim
- There is no basis in the defendant's argument that the plaintiff did not have to send their staff to Dubai to repurchase the four **I**

A disputed excavators. PW1 have said very clearly that if they do not bring the excavators back to Malaysia it would have constitute a material breach of the terms of the dealership.

(e) Paragraph 12(h) Of Amended Statement Of Claim

B The defendant's argument that the sale of the four disputed excavators to Mohamad Abdulrahman Al-Bahar must be approved by the defendant is without basis. There is no such legal requirement.

C The plaintiff's witness had also explained clearly that despite the usage of the word "used" in exh. D4, the four disputed excavators had not been used. The word "used" meant that the excavators had deteriorated in storage for about one year.

D The price of the four disputed excavator had fallen because apart from the deterioration in the four disputed excavators, at the material time a new model had came out, the market for excavators were in down trend and there were excess equipment in the market. Efforts had also been made to sell the same at USD100,000 but the offer was only USD85,000 per unit (see evidence of PW2).

E (f) In the circumstances there is no basis for the defendant submission that the loss suffered by the plaintiff had not been proved.

[41] Failure To Mitigate

F (a) The quotation dated 14 February 2006 stated very clearly that the ISU discount is USD125,900 per unit of the excavators not RM15,000 per unit as alleged by the defendant.

G (b) Clause 12(d) of the quotation states that if there is a breach in any of the ISU condition, the plaintiff is entitled to revoke the ISU discount in which event the defendant shall forthwith upon demand pay to the plaintiff an amount equivalent to the ISU discount.

H In addition to being liable to pay the plaintiff an amount equivalent to the ISU discount, the defendant is also liable to indemnify the plaintiff from claim by the plaintiff's principal and/or their respective distributors or agents for price equalisation of territorial rights and services fees.

I (c) Had the plaintiff invoked their rights under this provision the defendant would have to pay to the plaintiff the following amount:

$$\text{USD125,900} \times 4 \text{ units} = \text{USD } 503,600$$

- Based on the exchange rate used at the material time at USD1:RM3.3586 the ISU discount repayable to the plaintiff would have been RM1,691,390.96. **A**
- (d) It was to mitigate such losses and avoid a material breach of their dealership agreement with principal Caterpillar that the plaintiff took pains to send their senior manager to Miri from Kuala Lumpur to persuade the defendant to bring back the excavators to Malaysia. **B**
- (e) It was after their effort to persuade the defendant to withdraw the four disputed excavators from the auction in Dubai was ignored that the plaintiff sent their senior staff to Dubai to buy back the excavators. (exh. P10). **C**
- (f) After the plaintiff bought the four excavators in December 2006 in Dubai from the auctioneer Ritchie Brothers, the plaintiff, in another attempt to mitigate their losses, offered the defendant to buy back the four excavators at the same price the plaintiff paid for them in Dubai and again the defendant refused. (exh. P11). **D**
- (g) The plaintiff had also tried to sell the four disputed excavators by offering them to CAT Re-Distribution Services Incorporation for all Caterpillar dealers worldwide. **E**
- (h) It was only after all the above attempts were in vain that the plaintiff advertised the four disputed excavators for sale in various newspapers in Singapore and Malaysia and on their website. The only bid received was from Mr Mohd Abdulrahman Al-Bahar who bought the four disputed excavators as a package deal for USD85,000 per unit. (exhs. P12 and P13). **F**
- (i) The defendant contends that the plaintiff should have exercised their right under s. 14(a) of the Dealership Agreement (exh. D2) between the plaintiff and their principal which would have resulted in them losing only RM152,763.90. However PW1 has explained that section/cl. 14 did not apply to the situation at hand. Section/cl. 14 only apply when the plaintiff's customer informed them at the time of purchase that they will be taking the machines outside of the scheduled territories of Malaysia and Brunei. **G**
- (j) In the circumstances it is completely incorrect to say that the plaintiff did not mitigate their losses. **H**

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A [42] Amendment To Amended Statement Of Claim By Oral Application

B (a) This court has allowed the plaintiff to amend their amended statement of claim in the course of this trial. This issue has not been canvassed by the plaintiff at this trial. Be that as it may, it is sufficed to say that it is trite, amendment to the pleadings (*vis* statement of claim etc,) can be made at any stage of proceedings before the judgment is entered provided, in the circumstances of amendment to statement of claim, it did not alter the cause of action and the bottom line is it did not cause prejudice to the defendant.

C (b) In the case instance, there is nothing to suggest that this court has no power to allow the oral application to the said amendment and in doing so it had not prejudiced the defendant in anyway.

D Conclusion

E [43] It is incorrect to contend that the plaintiff's case relies solely on the said quotation as argued by the defendant. The plaintiff's case is based on an agreement in writing contained in and evidenced by a quotation dated 14 February 2006, referred to in para. 3 of the amended statement of claim as "agreement".

[44] Forming part and parcel of this "agreement" are three documents described as the plaintiff's fax transmission (exh. D1), plaintiff's equipment invoice (exh. P5) and plaintiff's official receipt (exh. P8).

F [45] The plaintiff has established a *prima facie* case against the defendant that there was a legally binding contract between the plaintiff and the defendant, that there was a breach of the ISU condition resulting in damages suffered by the plaintiff.

G [46] To borrow the words of the Court of Appeal in *Subry Hamid* "this *prima facie* case which must be presumed to be true in the absence of any explanation from the defendant was strengthened and became a strong or even an overwhelming case as a result of the defendant's silence".

H Consequently this court found that the plaintiff has discharged the burden set out in ss. 102 and 103 of the Evidence Act.

I [47] It is then for the defendant to satisfy the burden set on them under s. 101 of the Evidence Act to prove their defence. It is up to them to produce evidence to discharge their burden under ss. 102 and 103 thereof. The defendant chose not to do so and an adverse inference

should be drawn against them. Consequently the defendant's allegation that the four disputed excavators were bought pursuant to an independent contract made partly oral and partly written is therefore untenable. (See Court of Appeal case *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484).

[48] In the circumstances and for the reasons as aforesaid this court enter judgment against the defendant for the sum of RM822,609.71 with interest thereon at 8% from the date of issuance of writ until full and final settlement and costs on a full indemnity basis to be taxed unless agreed.

A**B****C****D****E****F****G****H****I**